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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 579

In the Matter of the Application of
FRIEDRICH GRUSCHWITZ and ALBERT FRITZ,
Petitioners.

FOR SPRAY-PLASTERING-DEVICE FOR APPLYING MORTAR TO CEILINGS AND WALLS OF BUILDINGS

REPLY BRIEF FOR THE PETITIONERS

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ARGUMENT

1. The principal reason that the respondent sets forth for denying the petitioners' petition for a writ of certiorari is that the decision below is correct. In support of this contention the respondent makes several statements which clearly point out that the decision below is the result of a factual misinterpretation by Judge Martin whose concurring opinion was the determinative one in the three to two decision of the Court of Customs and Patent Appeals.

Judge Martin stated his reason for concurring in the dismissal of the appeal as follows:

> "Here, it seems to me that since there are several dates involved, any one of which could be determinative of the issues here presented, appellants failed to comply with the provisions of 35 U. S. C. 142 in not setting forth their position as to the board's disposition of these dates in their reasons of appeal" (Pet. 8(a)).

This opinion of Judge Martin should be compared with his opinion in *Application of Arnold and Brandt*, 315 F. 2d 951, where he found the identical reasons of appeal sufficient since the examiner and the Patent Office Board of Appeals had relied on only one reference in rejecting the applicant's claims. Judge Martin's theory appears to be that reasons of appeal such as those given by petitioners in the instant case are sufficient where only one point is at issue, but are insufficient where multiple questions are involved. This being the case, the decision below is clearly in error because there was, in fact, only one point at issue. As pointed out by respondent in his brief (Res. 8):

> "The contested issue before the Patent Office was whether the German invention was patented on January 23, 1958, when a notice in the Patent blatt (Patent Gazette) announced that a patent had been granted, or whether it was patented in Germany on April 11, 1958, when the specification of the patent was issued in printed form in Germany * * *."

The respondent states further (Res. 8):

> "In light of the issue before the Patent Office, it would seem that the petitioners' statement of reasons for appeal should have alleged that the Patent Office erred in ruling that their invention was patented in Germany on January 23, 1958, instead of on April 11, 1958, and that, therefore, their application in this country was not barred by 35 U. S. C. 102(d)."

The above statements of the respondent clearly reveal that there was only one point at issue in the Patent Office

Board of Appeals, namely, hether the German patent was granted on January 23, 1958, or on April 11, 1958. If this fact had been realized by the concurring judge below, the decision of the Court of Customs and Patent Appeals would have been three to two in favor of the petitioners. The decision below thus is based upon a misinterpretation of fact by the judge whose concurring vote was determinative of the decision of the Court of Customs and Patent Appeals.

2. In the respondent's brief it is argued that a bill is pending before the House Committee on the Judiciary which would amend Sections 142, 143 and 144 of 35 USC for the purpose of conforming the procedures in patent appeals to the Court of Customs and Patent Appeals to those governing appeals from the district courts to the courts of appeals. It is argued that this is ". . . another factor militating against certiorari in this case" (Res. 9). No authority is cited to support respondent's argument that the pendency of legislation designed to change a law should prevent this Court from accepting a Petition for a Writ of Certiorari in a case which has been decided based upon a seemingly incorrect interpretation of such law.

Respectfully submitted,

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